No. 82-1324

In the Supreme Court of the United States

October Term, 1982

NATIONAL FARMERS' ORGANIZATION, INC.,
Petitioner,

vs.

MID-AMERICA DAIRYMEN, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPPOSITION BRIEF OF MID-AMERICA DAIRYMEN, INC.

EUGENE GRESSMAN
Counsel of Record
Fordham University School of Law
140 West 62nd Street
New York, New York 10023
(212) 841-5242

JOHN C. GAGE
MAJOR W. PARK, JR.
LINDA V. GILL
GAGE & TUCKER
2345 Grand Avenue
Suite 2800
Kansas City, Missouri 64108
(816) 474-6460
Counsel for Respondent, Mid-America Dairymen, Inc.

(Other Counsel on Inside Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

Of Counsel:

GEORGE E. LEONARD
SHUGART, THOMSON & KILROY
911 Walnut
Suite 900
Kansas City, Missouri 64106
(816) 421-3355

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Respondent Mid-America Dairymen, Inc. (Mid-Am) respectfully submits this brief in opposition to a Petition for Writ of Certiorari filed by the National Farmers' Organization, Inc. (NFO), to review that part of a decision of the United States Circuit Court of Appeals for the Eighth Circuit which upheld findings that certain litigation was not instituted against NFO in bad faith. On February 25, 1983, respondent was granted an extension of time to and including March 25, 1983, in which to file this brief in opposition.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 687 F.2d 1173, appears in the Appendix of the Petition (hereinafter "A."), A. 1a. The opinion of the United States District Court for the Western District of Missouri is reported at 510 F. Supp. 381, and appears in the Appendix of the Petition at A. 67a.

STATEMENT OF THE CASE

Respondent Mid-Am is a cooperative marketing association incorporated under the cooperative laws of Kansas. All of its member-owners, officers and directors are dairy farmers actively engaged in milking cows who deliver their milk to Mid-Am for marketing to other organizations or for conversion into dairy products such as butter, cheese and milk powder in manufacturing plants owned by Mid-Am. As a cooperative association, all of the profits or "savings" resulting from the marketing and sales efforts of Mid-Am with respect to their milk are returned annually to its farmer members on a patronage basis. Each member-owner of Mid-Am signs a written membership and marketing agreement designating Mid-Am as his or her exclusive marketing and bargaining association and agrees to deliver all of his or her milk production to Mid-Am for the contract term.

Petitioner, NFO, a not-for-profit corporation, had members located throughout the United States at the time this suit was filed. Most of NFO's members were engaged in various phases of agriculture, however, a few of its members were not engaged in any phase of agriculture. NFO

was a large organization which had negotiated sales contracts in 1969 on behalf of its farmer members involving over $600,000,000 worth of farm commodities.

In 1970 and immediately prior to the institution of this suit, NFO was seeking recognition by the U.S. Department of Agriculture as a "cooperative" association in order to bargain on behalf of dairy farmers, including those that were members of Mid-Am and marketing through Mid-Am, under regulations governing the Federal Milk Marketing Order system. In addition, NFO was obtaining milk by soliciting dairy farmers who were members of Mid-Am to leave Mid-Am and permit NFO to bargain for the terms and conditions of sale of their milk. Many of these dairy farmers were leaving Mid-Am without proper notice of termination of their written membership and marketing contracts. As an inducement to the dairy farmers to leave Mid-Am, NFO was using money from its general funds derived from all segments of agriculture to increase its payments to the dairy farmer and make it appear that NFO could sell for less and yet return as much or more money for the dairy farmers than Mid-Am. Contrary to the implications contained in the Petitioner's brief, NFO's entry into milk marketing was more comparable to General Motors' entry into aircraft manufacturing than to Mom and Pop's Bakery's entry into the marketing of bread on a nationwide basis.

Unable to resolve its disputes through negotiation and discussion, Mid-Am sought legal advice from a law firm with antitrust experience not then associated with representing the company. After reviewing the history of friction between Mid-Am and NFO together with the existing dispute, the special legal counsel opined that NFO's conduct was actionable and recommended filing of this antitrust suit which forms the basis of the NFO certiorari petition.

The instant action was filed by Mid-Am in March of 1971. It was filed as a class action upon advice of counsel that pursuant to *Farmers Co-op. Oil Co. v. Socony Vacuum Oil Co., Inc.*, 133 F.2d 101 (8th Cir. 1942), Mid-Am's members were the proper parties plaintiff. The Manual for Complex Litigation at that time provided for the routine entry of an order prohibiting defendants and their counsel from communicating with class members.

NFO counterclaimed, naming Associated Milk Producers, Inc. (AMPI), Central Milk Producers Cooperative (CMPC), Associated Reserve Standby Pool Cooperative (ARSPC) and Beatrice Foods as third party defendants. NFO filed its counterclaim in its own name and on behalf of all NFO members with its officers, directors and several members as class representatives. AMPI filed a counterclaim to NFO's third party suit after having been sued by NFO in this case.

The Mid-Am antitrust and state law claims against NFO were tried to the Court and lasted only two weeks. The trial of NFO's claims, however, lasted 18 months. After this lengthy trial, the district court found that NFO, Mid-Am and AMPI had not sustained their respective burdens of proof and dismissed all claims. The Eighth Circuit affirmed with respect to Mid-Am and AMPI's claims and with respect to NFO's actual and attempted monopolization claims, reversing only as to NFO's conspiracy claim. The district court found, as affirmed by the Eighth Circuit, that this lawsuit against NFO was protected under the *Noerr-Pennington* Doctrine as a genuine dispute regarding NFO's solicitation methods, and NFO's corporate and financial structure and programs which were not typical of farm cooperatives. 687 F.2d 1195, A. 35a.

NFO asks this Court to change the law by deciding that persons who institute legitimate, meritorious litigation against others for in part anti-competitive purposes violate the Sherman Act.

REASONS THE WRIT SHOULD BE DENIED

The *Noerr-Pennington* Doctrine holds that genuine efforts to petition public officials are not antitrust violations even if they are instituted or maintained for anticompetitive purposes, unless they are a sham. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In its only clear application of the "sham exception", this Court has found a sham in repetitive baseless suits filed *regardless of merit*. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The determination of genuineness of effort, baselessness of a lawsuit, purpose and intent are questions of fact for the trial court, *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 543 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), and regardless of the answer to the question posed by petitioner, a claim of sham litigation, whether a single suit or multiple suits, will require a factual analysis and determination. P. AREEDA, ANTITRUST LAW ¶ 203.1, at 5-9 (Supp. 1982).

In this case the trial court held that the respondent's litigation against NFO did not constitute a sham, specifically finding that the evidence adduced did not establish that the defendants instituted litigation in bad faith against NFO. 510 F. Supp. at 503; A. 319a-20a. The Eighth Circuit affirmed the trial court's finding, notwithstanding some evidence that "the litigation was intended in part to hamper NFO's ability to compete." 687 F.2d at 1200; A. 45a. The Court of Appeals, after its review of the evidence, concluded that "there were genuine disputes regarding NFO's solicitation methods" and "could not say the claims were so groundless as to come within the 'sham litigation'

exception. . . ." *Id.* Thus, both of the courts below held that the respondent's litigation was instituted upon probable cause or in good faith.

Clearly it is not this Court's task to undertake an independent evaluation of the evidence. *Graver Tank & Manufacturing Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This Court should not and has repeatedly held it cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional error. *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 661 (1967).

Indeed, the decision below was correct and not in conflict with any other circuit or with the decisions of this Court. The Eighth Circuit held that probable cause or grounds prevented the litigation against NFO from being a sham even if it was partially intended to hamper NFO's ability to compete. Every recent reported circuit decision has analyzed "sham claims" by considering probable cause and intent or purpose in bringing or maintaining the litigation.[1]

The clear holding of *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) supports the cir-

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1. *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896-97 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 2958 (1982); *Hospital Building Co. v. Trustees of Rex Hospital*, 691 F.2d 678, 688 (4th Cir. 1982); *Coastal States Marketing, Inc. v. Hunt*, 1982-83 Trade Cas. (CCH) ¶ 65,140 (5th Cir. 1983); *Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 615 F.2d 1372 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1981); *MCI v. American Telephone & Telegraph Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,137, 71,351, 71,409 (7th Cir. 1983); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3613 (U.S. Feb. 22, 1983) (No. 82-1110); *Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045 (9th Cir. 1982); *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 663 F.2d 253, 262-63 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171 (10th Cir. 1982).

cuits' view. There this Court held that a complaint alleging that the defendants conspired to automatically institute actions with or without probable cause and *regardless of the merits* stated a claim under the sham exception. This is completely distinguishable from Mid-Am's case as it was neither filed automatically nor without regard to the merits as both decisions below have held. Moreover, conduct by Mid-Am in bringing this action neither resembled any of the other conduct set out as examples of sham in *California Motor Transport* nor did it involve improper uses of the judicial system outside the limits of the Court's prescribed procedures. *Id.* at 515. Importantly, Mid-Am did not routinely file repetitive actions against all of its competitors. The exact opposite was established at trial, as recognized on appeal. 687 F. 2d at 1200; A. 45a. The only competitor Mid-Am sued was NFO, and on a meritorious claim. Clearly, the Eighth Circuit's decision is squarely in line with *California Motor Transport* and the other circuits. Where, as here, the Court of Appeals did not misapprehend or grossly misapply the standard in appraising the evidence, this Court should not grant certiorari and substitute its judgment, *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918).

Further, the petitioner asks this Court to change existing law because of a supposed conflict between all of the circuits and a Seventh Circuit decision, *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982).[2] According to a later Seventh Circuit panel, however, *Grip-Pak* only analogizes sham litigation to the common law torts of malicious prosecution and abuse of process without setting forth any general definition of sham litigation. *MCI*

2. In *Grip-Pak*, plaintiff alleged that Illinois Tool had prosecuted three baseless and groundless suits.

v. American Telephone & Telegraph Co., 1982-83 Trade Cas. (CCH) ¶ 65,137, at 71,410. Clearly, the later Seventh Circuit panel declined to adopt *Grip-Pak's* "analogy", and *MCI* cited with approval *Gainsville v. Florida Power & Light Co.*, 488 F. Supp. 1258 (S.D. Fla. 1980), which held that under *Noerr-Pennington*, intention to harm was not enough to state an antitrust violation. Thus, the Seventh Circuit is not in conflict with the Eighth Circuit or any other circuit on this issue.

Petitioner seeks to change the law to make the mere filing of an antitrust lawsuit an antitrust violation itself where there is *any* anti-competitive intent in the heart and mind of the plaintiff at the time of filing. Any antitrust lawsuit against a competitor is inherently anti-competitive by virtue of the interests advanced and the effect of any damage award on the defendant's coffers. Antitrust plaintiffs cannot avoid that knowledge and, therefore, at least some anti-competitive intent will always be found. Thus, proof of a basis or ground for bringing a lawsuit is the critical bulwark against the effective denial of access to the courts in antitrust disputes.

CONCLUSION

This case involves a factual determination which was made by the trial court and affirmed on appeal. The record below adequately shows that Mid-Am's purpose in instituting this suit was (1) to prevent NFO and others from inducing Mid-Am members to breach their marketing contracts and (2) to determine the appropriateness of the structure and programs of NFO which were not typical of farmer cooperatives. The two courts below correctly applied the prevailing law, as decided by this Court and as applied

by all of the other circuits. Therefore, NFO's Petition for a Writ of Certiorari should be denied.

EUGENE GRESSMAN
Counsel of Record
Fordham University School of Law
140 West 62nd Street
New York, New York 10023
(212) 841-5242

JOHN C. GAGE
MAJOR W. PARK, JR.
LINDA V. GILL
GAGE & TUCKER
2345 Grand Avenue
Suite 2800
Kansas City, Missouri 64108
(816) 474-6460
Counsel for Respondent, Mid-America Dairymen, Inc.

Of Counsel:
GEORGE E. LEONARD
SHUGART, THOMSON & KILROY
911 Walnut
Suite 900
Kansas City, Missouri 64106
(816) 421-3355